

Assigned for all purposes to: Stanley Mosk Courthouse, Judicial Officer: Maureen Duffy-Lewis

1 Reuben Yeroushalmi (SBN 193981)
2 reuben@yeroushalmi.com
3 Peter T. Sato (SBN 238486)
4 peter@yeroushalmi.com
5 **YEROUSHALMI & YEROUSHALMI***
6 An Association of Independent Law Corporations
7 9100 Wilshire Boulevard, Suite 240W
8 Beverly Hills, California 90212
9 Telephone: (310) 623-1926
10 Facsimile: (310) 623-1930

11 Attorneys for Plaintiff,
12 CONSUMER ADVOCACY GROUP, INC.

13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
14 **COUNTY OF LOS ANGELES- CENTRAL DISTRICT**

15 CONSUMER ADVOCACY GROUP, INC.,
16 in the public interest,

17 Plaintiff,

18 v.

19 BURLINGTON COAT FACTORY
20 INVESTMENTS HOLDINGS, INC., a
21 Delaware Corporation;
22 BURLINGTON COAT FACTORY DIRECT
23 CORPORATION, a New Jersey Corporation;
24 BURLINGTON STORES, INC., a Delaware
25 Corporation;
26 BURLINGTON COAT FACTORY
27 WAREHOUSE CORPORATION, a Florida
28 Corporation;
and DOES 1-10,

Defendants.

CASE NO. 19STCV42111

COMPLAINT FOR PENALTY AND
INJUNCTION

Violation of Proposition 65, the Safe
Drinking Water and Toxic Enforcement
Act of 1986 (*Health & Safety Code*, §
25249.5, *et seq.*)

ACTION IS AN UNLIMITED CIVIL
CASE (exceeds \$25,000)

1 Plaintiff CONSUMER ADVOCACY GROUP, INC. alleges a cause of action against
2 defendants BURLINGTON COAT FACTORY INVESTMENTS HOLDINGS, INC.;
3 BURLINGTON COAT FACTORY DIRECT CORPORATION; BURLINGTON STORES,
4 INC.; BURLINGTON COAT FACTORY WAREHOUSE CORPORATION; and DOES 1-10 as
5 follows:

6 **THE PARTIES**

- 7 1. Plaintiff CONSUMER ADVOCACY GROUP, INC. ("Plaintiff" or "CAG") is an
8 organization qualified to do business in the State of California. CAG is a person within
9 the meaning of Health and Safety Code Section 25249.11, subdivision (a). CAG, acting
10 as a private attorney general, brings this action in the public interest as defined under
11 Health and Safety Code Section 25249.7, subdivision (d).
- 12 2. Defendant BURLINGTON COAT FACTORY INVESTMENTS HOLDINGS, INC.,
13 ("BURLINGTON INVESTMENT") is a Delaware Corporation, doing business in the
14 State of California at all relevant times herein.
- 15 3. Defendant BURLINGTON COAT FACTORY DIRECT CORPORATION,
16 ("BURLINGTON DIRECT") is a New Jersey Corporation, doing business in the State of
17 California at all relevant times herein.
- 18 4. Defendant BURLINGTON STORES, INC ("BURLINGTON STORES") is a Delaware
19 Corporation, doing business in the State of California at all relevant times herein.
- 20 5. Defendant BURLINGTON COAT FACTORY WAREHOUSE CORPORATION
21 ("BURLINGTON WAREHOUSE") is a Florida Corporation, doing business in the
22 State of California at all relevant times herein.
- 23 6. Plaintiff is presently unaware of the true names and capacities of defendants DOES 1-10,
24 and therefore sues these defendants by such fictitious names. Plaintiff will amend this
25 Complaint to allege their true names and capacities when ascertained. Plaintiff is
26 informed, believes, and thereon alleges that each fictitiously named defendant is
27 responsible in some manner for the occurrences herein alleged and the damages caused

1 thereby.

- 2 7. At all times mentioned herein, the term "Defendants" includes BURLINGTON
3 INVESTMENT, BURLINGTON DIRECT, BURLINGTON STORES, BURLINGTON
4 WAREHOUSE and DOES 1-10.
- 5 8. Plaintiff is informed and believes, and thereon alleges that each of the Defendants at all
6 times mentioned herein have conducted business within the State of California.
- 7 9. Upon information and belief, at all times relevant to this action, each of the Defendants,
8 including DOES 1-10, was an agent, servant, or employee of each of the other
9 Defendants. In conducting the activities alleged in this Complaint, each of the Defendants
10 was acting within the course and scope of this agency, service, or employment, and was
11 acting with the consent, permission, and authorization of each of the other Defendants.
12 All actions of each of the Defendants alleged in this Complaint were ratified and
13 approved by every other Defendant or their officers or managing agents. Alternatively,
14 each of the Defendants aided, conspired with and/or facilitated the alleged wrongful
15 conduct of each of the other Defendants.
- 16 10. Plaintiff is informed, believes, and thereon alleges that at all relevant times, each of the
17 Defendants was a person doing business within the meaning of Health and Safety Code
18 Section 25249.11, subdivision (b), and that each of the Defendants had ten (10) or more
19 employees at all relevant times.

20 JURISDICTION

- 21 11. The Court has jurisdiction over this lawsuit pursuant to California Constitution Article
22 VI, Section 10, which grants the Superior Court original jurisdiction in all causes except
23 those given by statute to other trial courts. This Court has jurisdiction over this action
24 pursuant to Health and Safety Code Section 25249.7, which allows enforcement of
25 violations of Proposition 65 in any Court of competent jurisdiction.
- 26 12. This Court has jurisdiction over Defendants named herein because Defendants either
27 reside or are located in this State or are foreign corporations authorized to do business in
28

1 California, are registered with the California Secretary of State, or who do sufficient
2 business in California, have sufficient minimum contacts with California, or otherwise
3 intentionally avail themselves of the markets within California through their manufacture,
4 distribution, promotion, marketing, or sale of their products within California to render
5 the exercise of jurisdiction by the California courts permissible under traditional notions
6 of fair play and substantial justice.

- 7 13. Venue is proper in the County of Los Angeles because one or more of the instances of
8 wrongful conduct occurred, and continues to occur, in the County of Los Angeles and/or
9 because Defendants conducted, and continue to conduct, business in the County of Los
10 Angeles with respect to the consumer product that is the subject of this action.

11 **BACKGROUND AND PRELIMINARY FACTS**

- 12 14. In 1986, California voters approved an initiative to address growing concerns about
13 exposure to toxic chemicals and declared their right "[t]o be informed about exposures to
14 chemicals that cause cancer, birth defects, or other reproductive harm." Ballot Pamp.,
15 Proposed Law, Gen. Elec. (Nov. 4, 1986) at p. 3. The initiative, The Safe Drinking
16 Water and Toxic Enforcement Act of 1986, codified at Health and Safety Code Sections
17 25249.5, *et seq.* ("Proposition 65"), helps to protect California's drinking water sources
18 from contamination, to allow consumers to make informed choices about the products
19 they buy, and to enable persons to protect themselves from toxic chemicals as they see
20 fit.

- 21 15. Proposition 65 requires the Governor of California to publish a list of chemicals known to
22 the state to cause cancer, birth defects, or other reproductive harm. *Health & Safety Code*
23 § 25249.8. The list, which the Governor updates at least once a year, contains over 700
24 chemicals and chemical families. Proposition 65 imposes warning requirements and
25 other controls that apply to Proposition 65-listed chemicals.

- 26 16. All businesses with ten (10) or more employees that operate or sell products in California
27 must comply with Proposition 65. Under Proposition 65, businesses are: (1) prohibited

1 from knowingly discharging Proposition 65-listed chemicals into sources of drinking
2 water (*Health & Safety Code* § 25249.5), and (2) required to provide "clear and
3 reasonable" warnings before exposing a person, knowingly and intentionally, to a
4 Proposition 65-listed chemical (*Health & Safety Code* § 25249.6).

5 17. Proposition 65 provides that any person "violating or threatening to violate" the statute
6 may be enjoined in any court of competent jurisdiction. *Health & Safety Code* § 25249.7.
7 "Threaten to violate" means "to create a condition in which there is a substantial
8 probability that a violation will occur." *Health & Safety Code* § 25249.11(e).
9 Defendants are also liable for civil penalties of up to \$2,500.00 per day per violation,
10 recoverable in a civil action. *Health & Safety Code* § 25249.7(b).

11 18. Plaintiff identified certain practices of manufacturers and distributors of Moringa Powder
12 of exposing, knowingly and intentionally, persons in California to Lead and Lead
13 Compounds ("Lead") of such products without first providing clear and reasonable
14 warnings of such to the exposed persons prior to the time of exposure. Plaintiff later
15 discerned that Defendants engaged in such practice.

16 19. On October 1, 1992, the Governor of California added Lead to the list of chemicals
17 known to the State to cause cancer (*Cal. Code Regs.* tit. 27, § 27001(b)). Pursuant to
18 Health and Safety Code Sections 25249.9 and 25249.10, twenty (20) months after
19 addition of Lead to the list of chemicals known to the State to cause cancer, Lead became
20 fully subject to Proposition 65 warning requirements and discharge prohibitions.

21 20. On February 27, 1987, the Governor of California added Lead to the list of chemicals
22 known to the State to cause developmental and reproductive toxicity (*Cal. Code Regs.* tit.
23 27, § 27001(c)). Lead is known to the State to cause developmental, female, and male
24 reproductive toxicity. Pursuant to Health and Safety Code Sections 25249.9 and
25 25249.10, twenty (20) months after addition of Lead to the list of chemicals known to the
26 State to cause reproductive toxicity, Lead became fully subject to Proposition 65 warning
27 requirements and discharge prohibitions.

SATISFACTION OF PRIOR NOTICE

21. On or about June 28, 2019, Plaintiff gave notice of alleged violations of Health and Safety Code Section 25249.6, concerning consumer products exposures, subject to a private action to BURLINGTON INVESTMENT, BURLINGTON DIRECT, BURLINGTON STORES, BURLINGTON WAREHOUSE and to the California Attorney General, County District Attorneys, and City Attorneys for each city containing a population of at least 750,000 people in whose jurisdictions the violations allegedly occurred, concerning the Moringa Powder.
22. Before sending the notice of alleged violations, Plaintiff investigated the consumer products involved, the likelihood that such products would cause users to suffer significant exposures to Lead, and the corporate structure of each of the Defendants.
23. Plaintiff's notice of alleged violation included a Certificate of Merit executed by the attorney for the noticing party, CAG. The Certificate of Merit stated that the attorney for Plaintiff who executed the certificate had consulted with at least one person with relevant and appropriate expertise who reviewed data regarding the exposures to Lead, the subject Proposition 65-listed chemical of this action. Based on that information, the attorney for Plaintiff who executed the Certificate of Merit believed there was a reasonable and meritorious case for this private action. The attorney for Plaintiff attached to the Certificate of Merit served on the Attorney General the confidential factual information sufficient to establish the basis of the Certificate of Merit.
24. Plaintiff's notice of alleged violations also included a Certificate of Service and a document entitled "The Safe Drinking Water & Toxic Enforcement Act of 1986 (Proposition 65) A Summary." *Health & Safety Code* § 25249.7(d).
25. Plaintiff is commencing this action more than sixty (60) days from the dates that Plaintiff gave notice of the alleged violations to BURLINGTON INVESTMENT, BURLINGTON DIRECT, BURLINGTON STORES, BURLINGTON WAREHOUSE and the public prosecutors referenced in Paragraph 21.

1 26. Plaintiff is informed, believes, and thereon alleges that neither the Attorney General, nor
2 any applicable district attorney or city attorney has commenced and is diligently
3 prosecuting an action against the Defendants.

4 **FIRST CAUSE OF ACTION**

5 (By CONSUMER ADVOCACY GROUP, INC. and against BURLINGTON
6 INVESTMENT, BURLINGTON DIRECT, BURLINGTON STORES,
7 BURLINGTON WAREHOUSE and DOES 1-10 for Violations of Proposition 65,
8 The Safe Drinking Water and Toxic Enforcement Act of 1986 (*Health & Safety*
9 *Code, §§ 25249.5, et seq.*))

10 **Supplemental Powder**

11 27. Plaintiff repeats and incorporates by reference paragraphs 1 through 26 of this complaint
12 as though fully set forth herein.

13 28. Each of the Defendants is, and at all times mentioned herein was, a manufacturer,
14 distributor, promoter, or retailer of Raw Organic Moringa Powder ("Moringa"), including
15 but not limited "HEARTY NATURALS;" "RAW ORGANIC;" "Moringa Powder;"
16 "NET WT 8OZ (226g);" "Sayani & Family;" "Developed and Distributed by: Hearty
17 Naturals P.O. Box 3871, West Mclean, VA 22013;" "www.heartynaturals.com;"
18 "Product of India;" "6 86751 32364 5."

19 29. Moringa contains Lead.

20 30. Defendants knew or should have known that Lead has been identified by the State of
21 California as a chemical known to cause cancer, developmental and reproductive toxicity
22 and therefore was subject to Proposition 65 warning requirements. Defendants were also
23 informed of the presence of Lead in Moringa within Plaintiff's notice of alleged
24 violations further discussed above at Paragraph 21.

25 31. Plaintiff's allegations regarding Moringa concerns "[c]onsumer products exposure[s],"
26 which "is an exposure that results from a person's acquisition, purchase, storage,
27 consumption, or other reasonably foreseeable use of a consumer good, or any exposure
28 that results from receiving a consumer service." *Cal. Code Regs. tit. 27, § 25602(b).*

1 Moringa is a consumer products, and, as mentioned herein, exposures to Lead took place
2 as a result of such normal and foreseeable consumption and use.

3 32. Plaintiff is informed, believes, and thereon alleges that between June 28, 2016 and the
4 present, each of the Defendants knowingly and intentionally exposed California
5 consumers and users of Moringa, which Defendants manufactured, distributed, or sold as
6 mentioned above, to Lead, without first providing any type of clear and reasonable
7 warning of such to the exposed persons before the time of exposure. Defendants have
8 distributed and sold Moringa in California. Defendants know and intend that California
9 consumers will use and consume Moringa, thereby exposing them to Lead. Defendants
10 thereby violated Proposition 65.

11 33. The principal routes of exposure are through ingestion especially direct (oral) ingestion,
12 hand to mouth pathways, inhalation, and trans-dermal absorption. Persons sustain
13 exposures primarily by eating and consuming Moringa, and additionally by handling
14 Moringa without wearing gloves or any other personal protective equipment, or by
15 touching bare skin or mucous membranes with gloves after handling Moringa, as well as
16 through direct and indirect hand to mouth contact, hand to mucous membrane, or
17 breathing in particulate matter dispersed from Moringa.

18 34. Plaintiff is informed, believes, and thereon alleges that each of Defendants' violations of
19 Proposition 65 as to Moringa have been ongoing and continuous, as Defendants engaged
20 and continue to engage in conduct which violates Health and Safety Code Section
21 25249.6, including the manufacture, distribution, promotion, and sale of Moringa, so that
22 a separate and distinct violation of Proposition 65 occurred each and every time a person
23 was exposed to Lead by Moringa as mentioned herein.

24 35. Plaintiff is informed, believes, and thereon alleges that each violation of Proposition 65
25 mentioned herein is ever continuing. Plaintiff further alleges and believes that the
26 violations alleged herein will continue to occur into the future.

27 36. Based on the allegations herein, Defendants are liable for civil penalties of up to
28

1 \$2,500.00 per day per individual exposure to Lead from Moringa, pursuant to Health and
2 Safety Code Section 25249.7(b).

3 37. Plaintiff has engaged in good faith efforts to resolve the claims alleged herein prior to
4 filing this Complaint.

5 **PRAYER FOR RELIEF**

6 Plaintiff demands against each of the Defendants as follows:

- 7 1. A permanent injunction mandating Proposition 65-compliant warnings;
8 2. Penalties pursuant to Health and Safety Code Section 25249.7, subdivision (b);
9 3. Costs of suit;
10 4. Reasonable attorney fees and costs; and
11 5. Any further relief that the court may deem just and equitable.

12
13 Dated: November 20, 2019

YEROUSHALMI & YEROUSHALMI

14
15
16 BY: 

Reuben Yeroushalmi
Attorneys for Plaintiff,
CONSUMER ADVOCACY GROUP, INC.